Supreme Court, U.S.
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No. 01-983

In the Supreme Court of the United States

VANESSA LEGGETT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether an order holding petitioner in contempt and incarcerating her for refusing to testify before a federal grand jury violated her First or Fifth Amendment rights or presents a live controversy now that petitioner has been released from custody.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-9) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 17, 2001. A petition for rehearing was denied on November 13, 2001 (Pet. App. 13). The petition for a writ of certiorari was filed on December 31, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In late 2000, a federal grand jury sitting in the Southern District of Texas convened an investigation into possible illegal activities of wealthy Houstonian

Robert Angleton. Among other things, Angleton was suspected of hiring his brother, Roger, to kill his wife, Doris. Pet. App. 2. Roger Angleton, the alleged triggerman, committed suicide while in custody at the Harris County jail. *Ibid.*

Petitioner is an English teacher and "aspiring freelance writer" who intends to write a book about the murder. Pet. App. 2.[1] She has conducted her own investigation of the crime, which has included interviews with both Angleton brothers, Roger's wife, and numerous other people connected to the case. The interviews were recorded on tapes and in written notes. *Ibid.*

On December 7, 2000, petitioner was subpoenaed to appear before the grand jury investigating Robert Angleton. She was assured that she was neither a target nor a subject of the proceedings. She testified before the grand jury without protest, and she did not object to providing the grand jury with her notes, tapes, and photographs. Pet. App. 2-3.

On June 18, 2001, the grand jury issued a subpoena to petitioner, directing her to appear and to bring:

> Any and all tape recorded conversations, originals and copies, of conversations you had with any of the following individuals [identifying 34 people by name], or any other recorded conversations with individuals associated with the prosecution of ROBERT ANGLETON, either with or without their consent, and all transcripts prepared from those tape recordings.

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[1] In her career, petitioner has published one article in an FBI publication ("Varieties of Homicide") and one fictional short story. Pet. App. 2 n.3. The court of appeals characterized her as a "virtually unpublished freelance writer operating without an employer or a contract for publication." *Id.* at 5.

Pet. App. 3. This time, petitioner moved to quash the subpoena, invoking the so-called "journalist's privilege" under the First Amendment. The district court denied the motion, and while her motion to reconsider was pending, she was served on July 18 with a new but virtually identical grand jury subpoena compelling her to appear the next day. *Ibid.*

Petitioner appeared before the grand jury on July 19, but refused to produce the tape recordings and notes, claiming privileges under the First and Fifth Amendments. As to the latter, defense counsel expressed concern that because petitioner recorded certain conversations without the consent of the interviewees, she might be subject to prosecution in certain States. See 7/6/01 Hearing 34; 7/19/01 Hearing 19-20. The government offered petitioner a "proffer letter," granting her use and derivative use immunity for her grand jury testimony, as well as for any statements made to federal agents. Petitioner refused the offer. Pet. App. 3-4.

In a hearing that same day, the district court held petitioner in contempt pursuant to 28 U.S.C. 1826(a) and ordered her jailed. Pet. App. 4.[2]

2. After expedited briefing, the court of appeals affirmed. It noted, first, that while a "qualified privi-

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[2] Section 1826(a) provides, in pertinent part:

> Whenever a witness in any proceeding before or ancillary to any court or grand jury of the United States refuses without just cause shown to comply with an order of the court to testify or provide other information * * * the court, upon such refusal * * * may summarily order his confinement at a suitable place until such time as the witness is willing to give such testimony or provide such information. No period of such confinement shall exceed the life of * * * the term of the grand jury, including extensions.

lege protects journalists from divulging confidential sources under limited circumstances," the privilege is weaker in criminal cases than in civil cases, and "reach[es] its nadir in grand jury proceedings." Pet. App. 5. The court held that, even if petitioner could be considered a "journalist" for purposes of the privilege, "the journalist's privilege is ineffectual against a grand jury subpoena absent evidence of governmental harassment or oppression." *Id.* at 5-6 (citing *Branzburg* v. *Hayes*, 408 U.S. 665, 710 (1972) (Powell, J., concurring); *United States* v. *Smith*, 135 F.3d 963, 971 (5th Cir. 1998)). The court further concluded that "[o]nly when the grand jury investigation is not being conducted in good faith is the journalists' privilege valid." *Id.* at 6 (internal quotation marks omitted).

Applying that standard, the court found that petitioner had failed to show that the grand jury investigation was not proceeding in good faith, or that she was harassed or oppressed by the proceedings:

> While perhaps not as narrowly tailored as would be ideal, the subpoena directing [petitioner] to produce her tape recordings and interview notes is not so overly broad as to be oppressive. Indeed, the subpoena clearly seeks material that is closely related to the subject of the grand jury investigation.

Pet. App. 6.

The court found petitioner's attempt to invoke her Fifth Amendment privilege against self-incrimination "equally unavailing":

> She has been repeatedly advised that she is neither a target nor a subject of the grand jury investigation. She has made no meaningful argument that the disclosure of her tape recordings and interview notes could be used against her in some future

> criminal prosecution. [Her] vague and speculative effort to invoke the Fifth Amendment is further undermined by the government's proffer of a written non-prosecution agreement.

Pet. App. 8. Because petitioner did not show "'reasonable cause to apprehend danger from a direct answer,' and because her answers would not 'furnish a link in the chain of evidence needed for a prosecution,'" the court found that she could not invoke the privilege against self-incrimination. *Ibid.*

3. On January 4, 2002, the grand jury's term expired. That day, petitioner was released from prison. On January 24, 2002, Robert Angleton was indicted on federal murder charges.

ARGUMENT

Petitioner renews her claim (Pet. 7-26) that she had a First Amendment privilege to refuse to answer the grand jury's questions. She also contends that, in refusing to testify, she validly invoked her Fifth Amendment privilege against self-incrimination. Pet. 26-30. Because petitioner has been released from custody, however, this case is moot. In any event, her claims do not warrant further review.

1. "Article III of the Constitution limits federal courts to the adjudication of actual, ongoing controversies between litigants." *Deakins* v. *Monaghan*, 484 U.S. 193, 199 (1988). "To qualify as a case fit for federal-court adjudication, 'an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed.'" *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 67 (1997) (quoting *Preiser* v. *Newkirk*, 422 U.S. 395, 401 (1975)). In other words, a litigant must continue to "suffer[], or be threatened with, an actual injury * * * likely to be redressed by a

favorable judicial decision." *Spencer* v. *Kemna*, 523 U.S. 1, 7 (1998) (quoting *Lewis* v. *Continental Bank Corp.*, 494 U.S. 472, 477 (1990)).

Petitioner seeks relief from the district court's order incarcerating her for refusing to testify before the grand jury. Under 28 U.S.C. 1826, petitioner's term of confinement was commensurate with the life of the grand jury. When the grand jury was terminated on January 4, petitioner was released from prison. She is thus no longer aggrieved by the district court's order, and the case is moot. See *Weinstein* v. *Bradford*, 423 U.S. 147, 148 (1975) (per curiam) (prisoner's challenge to parole board procedures mooted by his release from supervision); see also *In re Grand Jury Proceedings*, 863 F.2d 667, 668-669 (9th Cir. 1988) (case moot where contempt order for refusing to testify before grand jury expired with termination of grand jury); *In re Grand Jury Proceedings*, 785 F.2d 629, 630-631 (8th Cir. 1986) (same).

This is not a case that presents an issue "capable of repetition, yet evading review." *Roe* v. *Wade*, 410 U.S. 113, 125 (1973). That exception to the mootness doctrine applies only where "there [is] a reasonable expectation that the same complaining party would be subjected to the same action again." *Weinstein*, 423 U.S. at 149. Here, the grand jury completed its investigation, indicted Robert Angleton, and was terminated. The government has no intention (or reason) to reconvene the grand jury in connection with the case. Petitioner, thus, has no reasonable expectation that she will again be incarcerated for failure to answer the grand jury's questions.

2. Even if petitioner's First Amendment claim were not moot, it would be foreclosed by this Court's decision in *Branzburg* v. *Hayes*, 408 U.S. 665 (1972). In *Branz-*

burg, the Court held that journalists, like other citizens, must "respond to relevant questions put to them in the course of a valid grand jury investigation." *Id.* at 690-691; see *Cohen* v. *Cowles Media Co.*, 501 U.S. 663, 669 (1991) ("[T]he First Amendment [does not] relieve a newspaper reporter of the obligation shared by all citizens to respond to a grand jury subpoena and answer questions relevant to a criminal investigation, even though the reporter might be required to reveal a confidential source."); *University of Pennsylvania* v. *EEOC*, 493 U.S. 182, 201 (1990) (*Branzburg* "rejected the notion that under the First Amendment a reporter could not be required to appear or to testify as to information obtained in confidence without a special showing that the reporter's testimony was necessary.").

a. In *Branzburg*, the Court rejected the suggestion that courts should conduct a case-by-case balancing of interests each time a journalist is subpoenaed by a grand jury. Instead, the Court struck a one-time balance and announced a categorical rule: the state's interest in "law enforcement and in ensuring effective grand jury proceedings" justifies the "burden on First Amendment rights" when "reporters [are required] to give testimony in the manner and for the reasons that other citizens are called." 408 U.S. at 690, 700.[3]

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[3] The Court was also mindful of the practical problems posed by a case-by-case approach. See 408 U.S. at 702 n.39 (explaining that, under the "case-by-case method of developing rules, it will be difficult for potential informants and reporters to predict whether testimony will be compelled since the decision will turn on the judge's ad hoc assessment in different fact settings of 'importance' or 'relevance' in relation to the free press interest"); *id.* at 705 ("In each instance where a reporter is subpoenaed to testify, the courts would also be embroiled in preliminary factual and legal determinations with respect to whether the proper predicate had been

The Court acknowledged that "news gathering is not without its First Amendment protections" and noted that "grand jury investigations if instituted or conducted other than in good faith, would pose wholly different issues for resolution under the First Amendment." 408 U.S. at 707. The Court stated that "[o]fficial harassment of the press undertaken not for purposes of law enforcement but to disrupt a reporter's relationship with his news sources would have no justification." *Id.* at 707-708. Justice Powell underscored that point in a separate concurrence, in which he noted his view that news gatherers would be entitled to First Amendment protection where a grand jury's investigation "is not being conducted in good faith"—such as where the information sought "bear[s] only a remote and tenuous relationship to the subject of the investigation," or where there is "some other reason to believe that [the] testimony implicates confidential source relationships without a legitimate need of law enforcement." *Id.* at 710 (Powell, J., concurring). Justice Powell, however, joined the opinion of the Court, and his separate concurrence accordingly cannot be read to alter the holding of the case that, at least absent bad faith or an intent to harass, there is no

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laid for the reporter's appearance: * * * Is it likely that the reporter has useful information gained in confidence? Could the grand jury obtain the information elsewhere? Is the official interest sufficient to outweigh the claimed privilege? Thus, in the end, by considering whether enforcement of a particular law served a 'compelling' governmental interest, the courts would be inextricably involved in distinguishing between the value of enforcing different criminal laws.").

journalist's privilege to refuse to comply with a grand jury subpoena.[4]

Petitioner does not claim that the government conducted the grand jury investigation in bad faith or that the grand jury's subpoena was meant to harass her.[5] Instead, she contends (Pet. 8) that *Branzburg* mandates a "case-by-case balancing test" every time a journalist is subpoenaed to appear before the grand jury. That contention is mistaken. As explained above, the Court explicitly rejected such a case-by-case approach, opting instead for a bright line rule: journalists must answer to the grand jury just like other citizens. See *Branzburg*, 408 U.S. at 708 ("If there is no First Amendment privilege to refuse to answer the relevant and material questions asked during a good-faith grand jury investi-

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[4] See *In re Grand Jury Proceedings*, 5 F.3d 397, 401 (9th Cir. 1993) (Justice Powell's concurrence in *Branzburg* must be read to comport with majority opinion that he joined; "[t]he balancing of interests suggested by Justice Powell is in the limited circumstances he mentioned, where there is in effect, an abuse of the grand jury function."), cert. denied, 510 U.S. 1041 (1994); accord *Smith*, 135 F.3d at 968-969; *In re Shain*, 978 F.2d 850, 852 (4th Cir. 1992) ("[A]bsent evidence of governmental harassment or bad faith, the reporters have no privilege different from that of any other citizen not to testify about knowledge relevant to a criminal prosecution."); *In re Grand Jury Proceedings*, 810 F.2d 580, 585 (6th Cir. 1987) ("Justice Powell's concurring opinion * * * neither limits nor expands upon [the majority's] holding."); *In re Possible Violations of 18 U.S.C. 371, 641, 1503*, 564 F.2d 567, 571 (D.C. Cir. 1977) ("A newsman can claim no general immunity, qualified or otherwise, from grand jury questioning. On the contrary, like all other witnesses, he must appear and normally must answer. If the grand jury's questions are put in bad faith for the purpose of harassment, he can call on the courts for protection.").

[5] The district court found that the government did not harass petitioner. See 7/09/01 Sealed Order 3 (Record Excerpts No. 3); 7/19/01 Hearing 46-47.

gation, then * * * there is no privilege to refuse to appear before such a grand jury until the Government demonstrates some 'compelling need' for a newsman's testimony."); *Smith*, 135 F.3d at 968 (*Branzburg* "instructed that the needs of the press are not to be weighed against the needs of the government in considering grand jury subpoenas."); *In re Grand Jury Proceedings*, 5 F.3d 397, 400 (9th Cir. 1993) (*Branzburg* conducted a "one-time-only balancing of the conflicting interests."), cert. denied, 510 U.S. 1041 (1994).

b. Petitioner errs in contending (Pet. 12-21) that the decision below conflicts with cases from other courts of appeals requiring some form of case-specific balancing when a journalist is called upon to divulge information. Each of the cases cited by petitioner as requiring such case-specific balancing concerns a trial subpoena, not a grand jury subpoena such as those in this case and in *Branzburg*. For example, although petitioner cites (Pet. 14) the First Circuit's decision in *United States* v. *LaRouche Campaign*, 841 F.2d 1176, 1182 (1988), that case concerned a defendant's trial subpoena to a television network, and the court ultimately affirmed the district court's refusal to quash the subpoena on First Amendment grounds. Petitioner also cites (Pet. 14) *United States* v. *Burke*, 700 F.2d 70, 77 (2d Cir.), cert. denied, 464 U.S. 816 (1983), but that case too involved a defendant's trial subpoena to a journalist, not a grand jury subpoena. Moreover, even as applied to trial subpoenas, the Second Circuit has since explained that "*Burke*'s articulation of a general test applicable to all phases of a criminal trial was not necessary to the resolution of that case" and concluded that "*Burke* should accordingly be considered as limited to its facts." *United States* v. *Cutler*, 6 F.3d 67, 73 (2d Cir. 1993). The Third Circuit in *United States* v. *Cuthbertson*, 630

F.2d 139, 146-147 (1980), cert. denied, 449 U.S. 1126 (1981), similarly addressed a trial subpoena by the government to a television network; the only Third Circuit decision to address the question of a journalist's privilege in the grand jury context resulted in an affirmance by an equally divided en banc court, and it therefore has no precedential effect. See *In re Williams*, 963 F.2d 567 (3d Cir. 1992).

To extend the reasoning of the trial subpoena cases to the grand jury context, as petitioner urges, would conflict with the holding in *Branzburg*. See 408 U.S. at 682 ("The sole issue before us is the obligation of reporters to respond to grand jury subpoenas as other citizens do and to answer questions relevant to an investigation into the commission of crime."). Indeed, in refusing to recognize a reporter's privilege, the *Branzburg* Court repeatedly underscored the historically unique and important role of the grand jury. See, *e.g.*, 408 U.S. at 685 (noting that "[a]t common law, courts consistently refused to recognize the existence of any privilege authorizing a newsman to refuse to reveal confidential information to a grand jury"); *id.* at 688 (noting that "the grand jury's authority to subpoena witnesses is not only historic, but essential to its task" and that "the longstanding principle that 'the public . . . has a right to every man's evidence,' * * * is particularly applicable to grand jury proceedings") (citations omitted); *id.* at 701 ("A grand jury investigation is not fully carried out until every available clue has been run down and all witnesses examined in every proper way to find if a crime has been committed.") (internal quotation marks omitted).

As the court below noted, no court of appeals has recognized a qualified testimonial privilege in the context of a criminal grand jury. Pet. App. 7. There is

thus no conflict between this case and any decision of any other court of appeals, and further review is not warranted.[6]

3. Petitioner also claims (Pet. 26-30) that the court of appeals erred in finding that she did not have a basis for invoking her Fifth Amendment privilege against compelled self-incrimination. Even if that claim were not moot, it would not warrant this Court's review.

A witness may invoke the privilege against self-incrimination only when there is reasonable cause to believe that a direct answer would support a conviction or provide a link in the chain of evidence leading to a conviction. *Hoffman* v. *United States*, 341 U.S. 479, 486 (1951). To be self-incriminating, the compelled answers must pose a "substantial and 'real,' and not merely [a] trifling or imaginary, hazard[]" of criminal prosecution. *Marchetti* v. *United States*, 390 U.S. 39, 53 (1968); see *Ohio* v. *Reiner*, 532 U.S. 17, 20-21 (2001) (per curiam). The court of appeals found that petitioner made only a "vague and speculative" argument that compliance with the grand jury subpoena could incriminate her. Pet. App. 8; see *ibid.* (noting that petitioner "has made no meaningful argument that the disclosure of her tape recordings and interview notes

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[6] Petitioner separately contends that the grand jury subpoena amounted to an unlawful "prior restraint" on the publication of her book. Pet. 22-24. Because that issue was neither presented to, nor decided by, the court of appeals, it is not properly before this Court. See *Zobrest* v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them."). Furthermore, the Court in *Branzburg* specifically noted that requring journalists to comply with grand jury subpoenas does not amount to a "prior restraint or restriction on what the press may publish." 408 U.S. at 681.

could be used against her in some future criminal prosecution"). That factbound determination does not warrant this Court's review. See *United States* v. *Johnston*, 268 U.S. 220, 226 (1925). Furthermore, as the court also noted (Pet. App. 8), the government provided petitioner with a written non-prosecution agreement that bound the government to the full extent of 18 U.S.C. 6001 (1994 & Supp. V 1999).[7] It also represented that it would seek immunity from any state prosecution, if necessary. See 7/19/01 Hearing 35-36. The court of appeals correctly found that petitioner's refusal to testify was not justified under the Fifth Amendment.

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[7] The letter provided:

> Any information you provide in response to questions posed by law enforcement agents or a subsequent grand jury shall receive protections co-extensive with and limited by those conferred for testimony given pursuant to a compulsion order issued under the provisions of 18 U.S.C. § 6001 et seq. That is, such information shall not be used directly or indirectly against you in any criminal case, except that such information may be used against you in any prosecution for perjury, giving a false statement to a federal official in a matter within that official's jurisdiction, and/or obstruction of justice.

7/19/01 Letter (Record Excerpts No. 7).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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